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No. 71-1032

In the Supreme Court of the United States

OCTOBER TERM, 1971

I. W. THOMPSON, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 449 F. 2d 1333. The decision and order of the National Labor Relations Board are reported at 184 NLRB No. 14 (Pet. App. 11a-13a).[1]

JURISDICTION

The judgment of the court of appeals was entered on

[1] The Trial Examiner's decision, which the Board adopted, is set forth at pp. 1-50 of the Supplemental Appendix to the petition and at pp. 3-46 of the Appendix in the court below (hereafter referred to as "A.").

November 16, 1971, and a petition for rehearing was denied on December 29, 1971 (Pet. 2). The petition for a writ of certiorari was filed on February 12, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's findings that the employer refused to bargain in good faith with the union by failing to meet at reasonable times, by disavowing a proposal previously consented to in order to frustrate an agreement, and by withdrawing recognition from the union.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (29 U.S.C. 151, *et seq.*), are as follows:

> Section 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

A. The Board's Findings of Fact

1. *The negotiations*

In 1967, the Union,[2] which had been certified after a Board-conducted election in 1967 (A.5), and the Company entered into a collective bargaining agreement subject to termination upon 90 days' notice by either party (A. 5, 477-491). When the Union notified the Company on June 3, 1968, of its intention to amend the agreement and asked for available dates for negotiating (A. 5), the Company conducted a poll in which it found that a majority of its employees favored the Union (A. 38; 77-80, 475-476).

On July 24, 1968, the parties met for the first time to negotiate a new agreement. The Company was represented at this and subsequent meetings by Frank L. Thompson, its president, and attorney Risher M. Thornton. (A. 7.) On August 20, the Union's business manager wrote to the Company, requesting that meetings be held more frequently in the future and complaining that this had not been done in the past (App. 8, 53-54, 457).

The parties met again on September 10, September 16, October 4, and December 10 (A. 8, 84-85). But the Company cancelled meetings scheduled for January 8, 1969, and January 15, 1969 (A. 9, 213-215).

When negotiations resumed on February 12, the Union presented a written copy of a proposed contract

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[2] Local 826, International Union of Operating Engineers, AFL-CIO.

providing for a wage increase of 50 cents per hour and containing the identical seniority clauses that had been part of the prior agreement between the parties (A. 9-10, 217-218, 337, 496-498). Company president Thompson rejected the requested 50-cent per hour wage increase on the ground that the Company was "in line with what [its] competitors were paying" (A. 10, 218-219).

At the next meeting on March 18, the Company presented its counterproposals, suggesting, among other things, "grammatical corrections" in a seniority clause, which the Union agreed to (A. 10, 221, 237, 370-371, 476, 496-497). With respect to wages, president Thompson acknowledged that the Company paid $150 a week less per rig than some of its competitors. The Union replied that, if the Company gave a 20-cent per hour increase across the board, this would come to only $156 a week per rig (A. 12, 222). Thompson said that he would have to go back to his office and do some more figuring (A. 12, 223-224).

The parties met again on April 8 and June 17,[3] but reached no agreement on wages (A. 12-13, 14-15). Neither party discussed the seniority procedure at these meetings (A. 13, 15, 227, 235, 236). On June 20, the Company advised the Union that it was "going to give the wage increase and also a few adjustments" and that the wage increase would be "a minimum of 20 cents." The Union asked for the "earliest negotiation

[3] Meetings had been set for June 4 and June 10, but the Company cancelled both on the ground that its attorney was not available (A. 13, 227, 229).

date" in order "to incorporate the wage increase in with the working agreement" (A. 15-16, 235-236). The parties agreed to meet on July 1 (A. 16, 236).

This meeting began by a discussion of the proposals and counterproposals, item by item (A. 16, 236-237). Upon reaching the seniority procedure, Company attorney Thornton pointed out that some grammatical errors had been made; the Union agreed to correct these (A. 16, 237.) President Thompson then presented a list of proposed wages that he wanted to put into effect for the various classifications, but he did not offer to incorporate them in the contract (A. 16, 238). The Union countered by agreeing to drop its demand for certain fringe benefits (A. 16-17, 239-240).

Thereupon, Thompson said that he "wanted to look at the bumping procedure" of the proposed contract (A. 17, 240). The Union asked him why he wanted to talk about that item since they had "already agreed" to it (A. 17, 240). When Thompson answered that they had not, the Union reminded him that the Company had never mentioned changing the proposal (A. 17, 240-241). The Union business agent, Howell, inquired if Thompson was "having any problems with it"; Thompson replied, "No, not any that I know of but I want to look at it." Thompson then stated he had trouble with a clause in the proposed contract requiring the employer to give the Union a list of employees at the end of each 2-week pay period (A. 17, 241). Howell said that sending such a list every six months would suffice and the Company agreed (*ibid.*). Howell then observed that they were not "apart on anything." Thompson,

however, refused to sign a contract, stating that he wanted to take the seniority procedure and list clauses back to his officers because "We have got to have more time to look at it" (A. 17-18, 242). Howell replied: "Thompson you have been looking at that contract since June 4th, 1968 [more than a year] and I think you are just stalling for time. I don't think there is any way that you will sign a contract" (A. 18, 242). Thompson insisted he needed "more time" and proposed that they meet the following week on July 8 (*ibid.*). Howell objected, stating that he wanted to meet that afternoon or the next day (*ibid.*).

2. *The Company's campaign to undermine the Union*

Two days later, business agent Howell called attorney Thornton and agreed to meet on July 8. Thornton, however, told Howell that Thompson was "damned mad" about the strike vote[4] and he did not know whether the latter would want to meet on July 8. When Howell called on July 7, the Company told him that the "earliest possible date" for resuming negotiations would be July 29. (A. 19, 243-244.)

Although refusing to execute the contract, the Company insisted on putting the 20-cent wage increase into effect on July 13. The Union initially objected, but finally agreed because it believed that the Company had no intention of ever signing a contract and it did not

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[4] After the July 1 meeting, the Union held two strike vote meetings at which a majority of the employees in attendance voted to strike. However, Howell considered the vote not representative because so few employees had attended. (A. 19, 243.)

want the employees to be deprived of the raise any longer (A. 19-20, 244-245, 458-462).

Meanwhile, on July 6, the Company initiated a drive to get its employees to sign petitions that they "do not wish to have the Union * * * represent" them (A. 21, 464-474). One supervisor posted a petition and invited employees to sign (A. 25, 160-161, 464). Another supervisor gave a written statement to an employee, urging him to sign a petition and advising that, if he did not, he might not receive the 20-cent raise. This supervisor also asked the employee to post the petition for other employees to sign and then deliver it to the Company vice-president, which he did. (A. 22-23, 131-132, 137-138, 472.) Other supervisors engaged in similar conduct (A. 26-27, 164-165, 175, 190-191).

In addition, Company president Thompson, at an employee meeting on July 8, listed all the benefits employees presently enjoyed, said that he did not "need any damned union out there running his business," and told the employees to sign the petitions (A. 25, 162-163). At another meeting on July 13, Thompson said that he would "like to give [the men] a pay increase of twenty cents per hour but the union wouldn't let him unless he signed a contract and he didn't want to sign a contract." He also said that, "if enough people would sign [the petition], he would be glad to take it from there." He volunteered to bring a petition out to the employees so they "could sign it" and repeated that he "wasn't going to sign a contract with the union." (A. 24, 145-146.) At a third meeting with the employees on July 15, Thompson said, "I have put a petition * * * out

in the rigs * * * for my employees to sign to help me get the union out of my company." He added that he did not "like fence straddlers" and wished the men "would go along with [him] and if [they] can't see [their] way clear [they] can quit." (A. 26, 172-174.)

Approximately 125 of 154 employees signed the petitions (A. 28, 395, 464-474). On July 25, the Company wrote to the Union, withdrawing recognition and cancelling the bargaining session scheduled for July 29 (A. 29, 462-463).

B. The Decisions Below

The Board found that the Company had failed to meet at reasonable times with the Union; that it had consented to and then disavowed seniority procedures in order to avoid entering into an agreement with the Union; and that it had unilaterally effectuated a wage increase (A. 32, 35-36; Pet. App. 12a, n. 1). The Board concluded that by this conduct, and by thereafter withdrawing recognition from the Union,[5] the Company refused to bargain in good faith, in violation of Section 8(a)(5) and (1) of the Act (A. 33, 35-36, 39-40). The Board further found that the Company had violated Section 8(a)(1) of the Act by sponsoring and urging its employees to sign petitions repudiating the Union and by threatening never to sign a contract with the Union (A. 36-37). The Board ordered the Company, *inter alia*, to bargain with the Union upon request (A. 43-44).

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[5] The Board found that any loss in the Union's majority was attributable to the Company's unfair labor practices (A. 39).

The court of appeals found "substantial evidence to support the Board's findings" and enforced its order in full (Pet. App. 2a).

ARGUMENT

The basic issue presented by the petition is whether substantial evidence supports the Board's findings that the Company bargained in bad faith and induced its employees to repudiate the Union (Pet. 2-3). Such an issue does not warrant review by this Court. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491. In any event, as the statement indicates (pp. 3-8 *supra*), there is ample support in the record for the Board's findings.

Petitioner's contention that the Board's order improperly "compel[s] [it] to concede to bumping procedure provisions proposed by a Union without bargaining" (Pet. 8) misconceives the Board's decision. The Board found that the Company and the Union had agreed on such a provision and that the Company, in bad faith, later insisted on a second look at that provision in order to avoid entering into an agreement with the Union (A. 35-36). Thus, *Porter Co.* v. *National Labor Relations Board*, 397 U.S. 99, is not pertinent; the Board there sought to compel the employer to accept a checkoff provision that it had never agreed to in the negotiations.[6]

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[6] The other cases relied on by petitioner are not inconsistent with the decision below. In *United Steelworkers* v. *National Labor Relations Board* (*Florida Machine & Foundry Co.*), 441 F. 2d 1005 (C.A. D.C.), the court, although acknowledging that there was "evidence in the record from which to conclude that the Employer

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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was not acting in good faith" (*id.* at 1007), remanded the case to the Board because, in the court's view, portions of the Board's decision suggested that it had predicated its finding of bad faith on the fact that it "did not approve of certain of the proposals advanced by the Employer in the course of negotiations" (*id.* at 1009). The court subsequently enforced the Board's decision in that case, order entered November 9, 1971, not yet reported. In *Lodges 1746 & 743, Int. Ass'n of Mach. & Aero. Wkrs.* v. *National Labor Relations Board* (*United Aircraft Corp.*), 416 F. 2d 809 (C.A. D.C.), certiorari denied, 396 U.S. 1058, the court merely found that the employer had a reasonable basis for doubting that the union retained its majority employee support, and had asserted that doubt in good faith. A different conclusion is warranted where, as here, the employer's unfair labor practices contributed to the union's loss of majority support.

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